



## Ohio Board of Nursing

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17 S. High Street, Suite 660 • Columbus, Ohio 43215-3466 • 614-466-3947

December 2, 2020

The Honorable Robert McColley  
Ohio Senate  
Chair, Senate Health, Human Services and Medicaid Committee  
Senate Building  
1 Capitol Square  
Ground Floor  
Columbus, Ohio 43215

Chairman McColley and members of the Senate Commerce, Transportation and Workforce Committee:

Thank you for the opportunity to provide written testimony on behalf of the Ohio Board of Nursing as an interested party to House Bill 263, sponsored by Representative Kyle Koehler.

Professional licensing boards rely on a case-by-case evaluation of an applicant or licensee's criminal history as a determining factor when making licensure decisions. The case-by-case evaluation takes into consideration the nature and seriousness of the crime, extent of the applicant's past criminal activity, age of the applicant when the crime was committed, amount of time since the applicant's last criminal activity, conduct and work activity of the applicant before and after the criminal activity, completion of the terms of probation or deferred adjudication, evidence of the applicant's rehabilitation, and full disclosure of the arrest or conviction by the applicant to the board. When fashioning a remedy, boards must consider the aggravating and mitigating circumstances surrounding the acts, such as whether substance abuse issues that may impair the ability to practice contributed to the commission of the act and place patients at greater risk. Codifying these factors and making them more transparent to the public and profession is laudable. However, House Bill 263 takes these basic concepts and layers the administrative process with several barriers that may significantly impair the board's mission and duty to actively safeguard the health of the public through the effective regulation of nursing care.

### **CLEAR AND CONVINCING EVIDENCE STANDARD**

HB 263 requires a licensing authority to use a clear and convincing evidence standard when evaluating the factors of a conviction for an offense that may lead to the denial of an initial occupational license. Courts have long held that the standard of "clear and convincing" evidence is not the appropriate standard for such administrative actions, so

this would create two different standards for licensure action by any occupational licensing board/agency.

Clear and convincing evidence is difficult to obtain in many criminal actions, especially those of which are pled out in the early stages of investigation or adjudication. Some decisions on moving forward on criminal actions are taken to protect witnesses from further harm. The burden should not be shifted from that required in other administrative actions.

Ohio case law already requires that courts will affirm an order of a board or agency if it is supported by “substantial, reliable, and probative evidence.” *Our Place, Inc. v. Ohio Liquor Control Commission*, 63 Ohio St.3d 570 (1992). “Reliable evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.” “Probative evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.” “Substantial evidence is evidence with some weight; it must have importance and value.”

### **LOOKBACK TIME PERIODS**

HB 263 prohibits a licensing authority from considering a disqualifying offense when it occurred outside of certain lookback time periods. Professional licensing boards have concerns about the length of the lookback time period and suggest that a longer lookback is necessary in order to safely vet applicants for many healthcare professions.

Research on recidivism is not specific to certain crimes or occupations. Research is not robust or definitive on time periods for all crimes and for all occupations. The length of time required for reviewing a criminal offense is already mitigated in the bill by listing in statute various criteria including age of the offense.

### **LIST OF SPECIFIC CRIMINAL OFFENSES**

The bill requires licensing authorities to adopt a list of specific criminal offenses for which a conviction, judicial finding of guilt, or guilty plea may disqualify an individual from obtaining a license. Many licensing boards are concerned that such a list would be overly broad and lead to unnecessary disqualifications.

HB 263 requires, within 180 days after the bill’s effective date, a state licensing authority to adopt a list of specific criminal offenses for which a conviction, judicial finding of guilt, or plea of guilty may disqualify an individual from obtaining a license.

1. Analysis of disqualifying crimes is both fact and law specific. The offense that is pled to might not be the one charged or could fit a variety of facts which makes delineating a list problematic.
2. 180 days is not a reasonable time period to adopt rules.
3. Prohibition rules are not consistent with recent state laws looking to reduce the number.

4. The rule-making process is costly, in terms of time and money.
5. A better alternative may be to define “moral turpitude” in statute. Ohio cases find crimes of moral turpitude fit into three categories: willful conduct intended to deceive or defraud either a person or society; conduct involving dishonesty or falsification; and crimes involving sex offenses or intentional crimes against persons causing injury.

Ohio professional licensing boards continue to engage in reentry issues and concerns. The boards have had a representative on Ohio’s Ex-Offender Reentry Coalition from its inception in 2009. The Boards are supportive of a number of issues considered in this legislation. In the interest of public safety considerations, the Boards have respectfully requested that certain aspects of the bill be reconsidered and amended to better balance those public protection concerns on behalf of all Ohioans.

I have attached an article published in the Journal of Nursing Regulation from October 2012 entitled “When Employment and Licensure Intersect: Addressing Ex-Offenders in the Health Care Professions” which hopefully further evidences our commitment and careful consideration of these issues. The strategies presented here demonstrate willingness on behalf of professional regulatory boards to raise awareness, be transparent, and raise system-wide accountability. Our common goal is to develop collaborative relationships with stakeholders to develop policy options that keep a focus on public protection and are responsive to a segment of society that faces significant hurdles in reassimilating into everyday life.